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89-318

Supreme Court, U.S.
FILED
SEP 1989
JOSEPH F. SPANIOL, JR.
CLERK

No. 89-

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1989

RICHARD M. BARANCIK,
Petitioner,

v.

COUNTY OF MARIN, CALIFORNIA,
Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals for the Ninth Circuit

OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

The following additional question is presented:

Should the United States Supreme Court grant Certiorari to decide a question which will have absolutely no effect on the outcome of this litigation?

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STATEMENT OF THE CASE

Petitioner instituted an action in the Federal District Court "For Damages and Declaratory Relief Under the Constitution of the United States and Federal Civil Rights Act" because Respondent denied his application to upzone his property to three times the designated residential density.

The District Court granted the Respondent's motion for summary judgment in an unpublished decision (Appendix C to Petition for Certiorari). The Ninth Circuit affirmed the decision of the District Court in an opinion reported at 872 F.2d 834 (Appendix B to Petition). It denied a Petition for Rehearing and Suggestion for Rehearing En Banc (Appendix A to Petition).

It is impossible to improve on the cogent statement of facts contained in the Circuit Court's opinion commencing at 872 F.2d 835. However, inasmuch as Petitioner's recitation of facts is misleading and inaccurate in a number of particulars, the following information may be of assistance.

1. The Property

Petitioner's ranch is in a predominantly agricultural area with access via a winding, steep, narrow, unpaved fire road through an adjacent ranch, over 6000 feet from the nearest County road.[1] (CR 3:Ex.G:6; CR 103:Ex.14) The 561 acre property consists of a steeply sloping basin bounded on three sides by a ridge dominated by Loma Alta Peak, one of the County's highest, most visual and scenic peaks, after which the Ranch is named. (CR 3:Ex.G:6; CR 103:Ex.14.) There are no residences or other buildings on the property which has been used for cattle grazing for over 100 years. (CR 3:Ex.G:7.)

2. The 1972 Agricultural Zoning and 1973 General Plan

In 1972, the County rezoned most of the land in this area, including Loma Alta Ranch, to A-60, (Agricultural, one residential unit per 60 acres) without complaint from the owner. (Ordinance 1939, County Addendum 2; CR 103:Ex.8; CR 109: Para. 15; CR 166:2.)

The Marin Countywide plan or general plan was adopted in 1973. It divides the County into three environmental corridors. The eastern portion is designated the "City-Centered Corridor," the central portion is designated the "Inland Rural Corridor," and the Coastal areas are designated as the "Coastal Recreation Corridor." (CR 3:Ex.C:2-1; CR 107:Ex.A.) The Countywide Plan concentrates urban development in the City-Centered Corri-

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[1] This remote location is characterized by Petitioner as "immediately across Lucas Valley Road from the 'Skywalker Ranch.' " In fact, Loma Alta Ranch is actually two miles down the road and more than a mile inland from the Skywalker Ranch (CR 109: Para. 20). Moreover, the Skywalker property is not, as Petitioner claims, a "movie studio" and most certainly does not contain "a large number of dwelling units." (Petition, p. 3).

dor "so that the rest of the County can remain as open as possible." (CR 3:Ex.C:2-1 through 2-3, 5-28.) The Plan also endeavors to preserve agriculture and discourages premature subdivision and conversion of vital agricultural lands in the inland rural corridor which contains Petitioner's ranch. (CR 3:Ex.C:2-11; CR 166:1).

3. The 1979 Local Plan and Rezoning

The Nicasio Valley Community Plan (hererafter "NVCP") was adopted in 1979 as part of the County's general plan and includes the area in which Petitioner's Loma Alta Ranch is located. (CR 3:Ex.D; CR 103:Ex.2.3.) One of the fundamental goals of the NVCP is:

> "To encourage the preservation of agricultural land and activities; preserving the best agricultural land in the Valley in parcels large enough to permit the continuation of existing and the possibility of future agricultural activities." (CR 3:Ex.D:5.)

The NVCP specifically addresses Petitioner's Loma Alta Ranch and the four other large properties in the vicinity. (County Addendum 3; CR 3:Ex.D.27.) The NVCP estimates the maximum number of units possible for each property. A maximum of 112 ***residential*** units is permissible on these five properties. *Id.* The maximum number of residential units allocated to Petitioner's ranch is nine.[2] *Id.* The NVCP recommended rezoning Loma Alta from the A-60 (*A*gricultural, one unit per 60 acres) designation established in 1972 to ARP-60 (*A*gricultural-*R*esidential-*P*lanned, one unit per 60 acres). (CR 3:Ex.D:47.)

The new ARP zoning designation encouraged clustered development concentrated on a small portion of a property to enhance preservation of open space and agricultural land but did not increase or decrease the number of allowable units on Petitioner's property. (CR 3:Ex.D:42-43.) Petitioner's Loma Alta Ranch was rezoned from A-60 to ARP-60 in 1979 pursuant to the NVCP.

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[2] A number of other alternative uses are allowed on Petitioner's property including the conference center he proposed at one point. (See District Court Opinion [Appendix C to Petition, pp. C3 and C4]).

The other adjacent properties were also rezoned to the same or a reduced density than had previously existed in accordance with the Community Plan. (Ordinance 2418, County Addendum 5; CR 103:Ex. 12.)

4. The 1980 Purchase of the Property by Petitioner

Petitioner Barancik, a Chicago architect/developer, purchased the Loma Alta Ranch on January 16, 1980. (CR 39:4, 14.) Petitioner knew, at the time he purchased the property, the County's agricultural preservation policies and was aware that the property was zoned ARP-60 which permitted only nine residential units. (CR 39:4, 15-16; CR 103:Exs. 22, 23; CR 166:2.) The modest price of approximately $650,000 or $1,160 per acre (CR 39:4:14) was based on the residential density limits imposed by the County's agricultural zoning since 1972.

Despite repeated warnings from County officials and his own consultants that the County would not abandon its agricultural zoning in deference to a suburban type residential development at Loma Alta (CR 166:2; CR 39:2-16), Petitioner nevertheless embarked on a dogged campaign to triple the residential density specified for the property. (CR 103: Exs. 24, 26, 27, 16, 2: CR 166:2.) The County declined to accommodate him and this litigation ensued in 1985.

REASONS FOR DENYING THE WRIT

Certiorari should not be granted because:

A. The Petition does not engender any of the "special and important" reasons required for issuance of a writ by Supreme Court Rule 17.

B. The question posed by the Petition is academic because both the District and Circuit Courts have ruled that Petitioner's action is devoid of merit, irrespective of the statute of limitations issue.

C. The issues in this case narrowly apply to its unique facts.

D. The decision of the Ninth Circuit is plainly correct.

A. The Petition Does Not Satisfy The Requirements Of Supreme Court Rule 17

Petitioner is silent as to which of the "special and important reasons" set forth in Supreme Court Rule 17 he seeks to invoke. The Petition cites no decisions of the Supreme Court with which the Circuit Court decision conflicts, other than the claim, on page 14 of the Petition, that the decision is "adverse" to the ripeness doctrine. This contention is critically undermined by the fact that the Circuit Court actually ruled that "Barancik's petition is ripe for review." *Barancik v. County of Marin*, 872 F.2d 834, 836 (9th Cir. 1989); Appendix B to Petition, pp. B-3, B-8. Moreover, the asserted adversity, if it exists at all, is obviously a question of reconciliation, rather than a patent conflict.

The only other possible decisional conflict cited by Petitioner is another Ninth Circuit case, *Norco Construction, Inc. v. King County*, 801 F.2d 1143 (9th Cir. 1986) which is entirely consistent with the decision in this case. In *Norco*, the Court stated:

> "We conclude that under federal law the general rule is that claims for inverse taking, and for alleged related injuries from denial of equal protection or denial of due process by unreasonable delay or failure to act under mandated time periods, are not matured claims until planning authorities and state review entities make a final determination on the status of the property." *Id.* at p. 1145.

Here the final determination as to the use of the property was made by the County in 1979 and the statute of limitations then began to run, exactly in accordance with *Norco*.

B. The Question Posed By The Petition Is Academic

Petitioner urges this Court to determine whether the Circuit Court correctly applied the applicable statute of limitations. This is an exercise in sophistry because both the District Court and the Circuit Court found that the Petitioner's claims had no merit whatsoever. As the concurring opinion succinctly stated:

> "On the basis of the undisputed facts in the record, appellant could not prevail on any of his challenges to the county's original zoning, or to the county's rejection of plaintiff's

> request to treble the density permitted under that zoning." 872 F.2d 834 at 837; Appendix B to Petition, p. B-10.

Petitioner has not challenged the Court's determination that his claims have no merit. He has essentially abandoned these issues. *Collins v. City of San Diego,* 841 F.2d 337, 339 (9th Cir. 1988). Thus, even if the Supreme Court accepted Petitioner's hypothesis concerning the application of the statute of limitations, the case would still be dismissed.

As the Court stated in *Rice v. Sioux City Memorial Park Cemetery,* 349 U.S. 70, 74 (1955):

> "A federal question raised by a petitioner may be 'of substance' in the sense that, abstractly considered, it may present an intellectually interesting and solid problem. But this Court does not sit to satisfy a scholarly interest in such issues."

To the same effect, in *The Monrosa v. Carbon Black Export, Inc.,* 359 U.S. 180 (1959), the Court observed:

> "While this Court decides questions of public importance, it decides them in the context of meaningful litigation. Its function in resolving conflicts among the Courts of Appeals is judicial, not simply administrative or managerial."

C. The Issues In This Case Narrowly Apply To Its Unique Facts

A common denominator in most federal land use challenges, to the extent one can be ascertained, is an overt action by a regulatory agency which limits or circumscribes the existing rights of a property owner, e.g., *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles,* 482 U.S. 304 (1987) and *Nollan v. California Coastal Commission,* 483 U.S. 825 (1987).

In this instance, the local government has not initiated any action whatsoever. Petitioner purchased the property at a bargain price based on long standing zoning. The County only declined to support his quest to triple his investment by tripling the density of the property.

Petitioner's extraordinary assertion that the County is obliged to facilitate speculative aspirations is so far outside the mainstream of land use and planning jurisprudence that it is, by definition, *sui generis.*

D. The Decision Of The Ninth Circuit Is Plainly Correct

A precise delineation of the "continuing wrong doctrine" is contained in *Ward v. Caulk*, 650 F.2d 1144, 1147 (9th Cir. 1981) wherein the Court observed:

> "Ward's reasoning is incorrect. A continuing violation is occasioned by continual unlawful acts, not by continual ill effects for an original violation."

The density of Petitioner's property was established in 1972. In 1979, the master plan and clustering requirements were superimposed on the property but the density, about which Petitioner complains, remained unchanged. There is absolutely no evidence of a continuing course of unlawful acts by Respondent County. Since Petitioner's purchase of the property in 1980, the County's role has been passive throughout.

Petitioner also contends that the continuing wrong doctrine should be applied because of the special equities of this case. (Petition, pp. 12-13.) Simply stated, the equities involve balancing Petitioner's attempt to triple his investment against the efforts of the County of Marin to protect irreplaceable agricultural lands from invidious urban encroachment. This is hardly an equitable mandate which compels suspension of the applicable statute of limitation.

The paucity of Petitioner's argument is further evident from his hypothetical (Petition, p.6) that a Black person could not, after the limitations period, challenge a zoning ordinance which excluded Black people from a neighborhood. This superficial argument is oblivious to the provisions of California Government Code Section 65008 (Appendix A) which provides, in pertinent part:

> "Any action pursuant to this title by any city, county, or city and county in this state which denies to any individual or group of individuals the enjoyment of residence, land owner-

> ship, tenancy, or any other land use in this state because of religious or ethnic reasons is null and void."

Petitioner's argument also ignores the extensive procedures California has enacted which allow property owners to challenge zoning decisions (California Government Code Section 65009, Appendix A) and which require periodic review of the housing element in a County's Master Plan, at intervals of not less than five years (California Government Code Section 65588, Appendix A) and which afford individuals the right to challenge the General Plan or any elements thereof (California Government Code Section 65751, Appendix A).

Thus, while the statute of limitations may, as it is properly intended to do, limit the time within which a landowner may sue under 42 U.S.C. Section 1983, landowners in California nonetheless enjoy an extensive arsenal of state remedies which satisfy the theoretical concerns propounded by Petitioner.

The contention (Petition, p.8) that the Circuit Court's decision will generate burdensome litigation is manifestly spurious. Quite the opposite is true. Fundamentally, Petitioner claims that zoning ordinances never become final but are eternally vulnerable to legal challenge every time ownership is transferred or a rezoning is sought. This concept is essentially a complete abrogation of any statute of limitations and would encourage incessant litigation over matters long since decided.

CONCLUSION

For the foregoing reasons, the Petition for Certiorari should be denied.

Dated: September 8, 1989

Respectfully submitted,

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APPENDIX A

CALIFORNIA GOVERNMENT CODE SECTIONS

CALIFORNIA GOVERNMENT CODE SECTION 65008:

§ 65008. Discrimination; prohibition

(a) Any action pursuant to this title by any city, county, or city and county in this state which denies to any individual or group of individuals the enjoyment of residence, land ownership, tenancy, or any other land use in this state because of religious or ethnic reasons is null and void.

(b) No city, county, or city and county shall, in the enactment or administration of ordinances pursuant to this title, prohibit or discriminate against any residential development or emergency shelter because of the method of financing or the race, sex, color, religion, national origin, ancestry, lawful occupation, or age of the owners or intended occupants of the residential development or emergency shelter.

(c) No city, county, or city and county shall, in the enactment or administration of ordinances pursuant to this title, prohibit or discriminate against a residential development or emergency shelter because the development or shelter is intended for occupancy by persons and families of low and moderate income, as defined in Section 50093 of the Health and Safety Code, or persons and families of middle income.

For the purposes of this section, "persons and families of middle income" means persons and families whose income does not exceed 150 percent of the median income for the county in which the persons or families reside.

(d) No city, county, or city and county may impose different requirements on a residential development or emergency shelter which is subsidized, financed, insured, or otherwise assisted by the federal or state governments or by a local public entity, as defined in Section 50079 of the Health and Safety Code, than those imposed on nonassisted developments, except as provided in subdivision (e).

(e) Nothing in this title shall be construed to prohibit a city, county, or city and county from extending preferential treatment to residential developments or emergency shelters assisted by the

federal or state governments or by a local public entity, as defined in Section 50079 of the Health and Safety Code, or other residential developments or emergency shelters intended for occupancy by persons and families of low and moderate income, as defined in Section 50093 of the Health and Safety Code, or persons and families of middle income. This preferential treatment may include, but need not be limited to, reduction or waiver of fees or changes in architectural requirements, site development and property line requirements, building setback requirements, or vehicle parking requirements which reduce development costs of these developments.

(f) "Residential development," as used in this section, means a single family residence or a multifamily residence.

(g) This section shall apply to chartered cities.

The Legislature finds and declares that discriminatory practices which inhibit the development of housing for persons and families of low, moderate, and middle income, or emergency shelters for the homeless, are a matter of statewide concern.

CALIFORNIA GOVERNMENT CODE SECTION 65009:

§ 65009. Actions challenging local zoning and planning decisions; legislative findings; limitation of issues; time limitations; application of section

(a) (1) The Legislature finds and declares that there currently is a housing crisis in California and it is essential to reduce delays and restraints upon expeditiously completing housing projects.

(2) Legislature further finds and declares that a legal action challenging a decision of a city, county, or city and county has a chilling effect on the confidence with which property owners and local governments can proceed with projects. Legal actions filed to attack, review, set aside, void, or annul a decision of a city, county, or city and county pursuant to this division can prevent the completion of needed developments even though the projects have received required governmental approvals.

(3) The purpose of this section is to provide certainty for property owners and local governments regarding decisions made pursuant to this division.

(b) (1) In an action or proceeding to attack, review, set aside, void, or annul a finding, determination, or decision of a public agency made pursuant to this title at a properly noticed public hearing, the issues raised shall be limited to those raised in the public hearing or in written correspondence delivered to the public agency prior to, or at, the public hearing, except where the court finds either of the following:

(A) The issue could not have been raised at the public hearing by persons exercising reasonable diligence.

(B) The body conducting the public hearing prevented the issue from being raised at the public hearing.

(2) If a public agency desires the provisions of this subdivision to apply to a matter, it shall include in any public notice issued pursuant to this title a notice substantially stating all of the following: "If you challenge the (nature of the proposed action) in court, you may be limited to raising only those issues you or

someone else raised at the public hearing described in this notice, or in written correspondence delivered to the (public entity conducting the hearing) at, or prior to, the public hearing."

(3) The application of this subdivision to causes of action brought pursuant to subdivision (d) applies only to the final action taken in response to the notice to the city or county clerk. If no final action is taken, then the issue raised in the cause of action brought pursuant to subdivision (d) shall be limited to those matters presented at a properly noticed public hearing or to those matters specified in the notice given to the city or county clerk pursuant to subdivision (d), or both.

(c) Except as provided in subdivision (d), no action or proceeding shall be maintained in any of the following cases by any person unless the action or proceeding is commenced and service is made on the legislative body within 120 days after the legislative body's decision:

(1) To attack, review, set aside, void, or annul the decision of a legislative body to adopt or amend a general or specific plan. This paragraph does not apply where an action is brought based upon the complete absence of a general plan or a mandatory element thereof, but does apply to an action attacking a general plan or mandatory element thereof on the basis that it is inadequate.

(2) To attack, review, set aside, void, or annul the decision of a legislative body to adopt or amend a zoning ordinance.

(3) To determine the reasonableness, legality, or validity of any decision to adopt or amend any regulation attached to a specific plan.

(4) Concerning any of the proceedings, acts, or determinations taken, done, or made prior to any of the decisions listed in paragraphs (1), (2), and (3).

(d) An action or proceeding shall be commenced and the legislative body served within two years after the accrual of the cause of action as provided in this subdivision, if the action or proceeding meets both of the following requirements:

(1) It is brought in support of the development of housing projects which meet the requirements for housing for persons and families with low or moderate incomes set forth in Section 65915.

(2) It is brought with respect to actions taken pursuant to Article 10.6 (commencing with Section 65580) of Chapter 3 of this division, pursuant to Section 65589.5, 65863.6, 65915, or 66474.2 or pursuant to Chapter 4.2 (commencing with Section 65913).

A cause of action brought pursuant to this subdivision shall not be maintained until 60 days have expired following notice to the city or county clerk by the party bringing the cause of action, or his or her representative, specifying the deficiencies of the general plan, specific plan, or zoning ordinance. A cause of action brought pursuant to this subdivision shall accrue 60 days after notice is filed or the legislative body takes a final action in response to the notice, whichever occurs first. A notice or cause of action brought by one party pursuant to this subdivision shall not bar filing of a notice and initiation of a cause of action by any other party.

(e) Upon the expiration of the time limits provided for in this section, all persons are barred from any further action or proceeding.

(f) Notwithstanding Section 65700, this section shall apply to charter cities.

(g) Except as provided in subdivision (d), this section shall not affect any law prescribing or authorizing a shorter period of limitation than that specified herein.

(h) This section shall be applicable to those decisions of the legislative body of a city, county, or city and county made pursuant to this division on or after January 1, 1984.

CALIFORNIA GOVERNMENT CODE SECTION 65588:

§ 65588. Review and revision

(a) Each local government shall review its housing element as frequently as appropriate to evaluate all of the following:

(1) The appropriateness of the housing goals, objectives, and policies in contributing to the attainment of the state housing goal.

(2) The effectiveness of the housing element in attainment of the community's housing goals and objectives.

(3) The progress of the city, county, or city and county in implementation of the housing element.

(b) The housing element shall be revised as appropriate, but not less than every five years, to reflect the results of this periodic review.

In order to facilitate review by the department of housing elements, local governments following shall prepare and adopt the first two revisions of their housing elements no later than the dates specified in the following schedule, notwithstanding the date of adoption of the housing elements in existence on the effective date of the act which amended this section during the 1983-84 session of the Legislature.

(1) Local governments within the regional jurisdiction of the Southern California Association of Governments: July 1, 1984, for the first revision and July 1, 1989, for the second revision.

(2) Local governments within the regional jurisdiction of the Association of Bay Area Governments: January 1, 1985, for the first revision, and July 1, 1990, for the second revision.

(3) Local governments within the regional jurisdiction of the San Diego Association of Governments, the Council of Fresno County Governments, the Kern County Council of Governments, the Sacramento Council of Governments, and the Association of Monterey Bay Area Governments: July 1, 1985, for the first revision, and July 1, 1991, for the second revision.

(4) All other local governments: January 1, 1986, for the first revision, and July 1, 1992, for the second revision.

(5) Subsequent revisions shall be completed not less often than at five-year intervals following the second revision.

(c) The review and revision of housing elements required by this section shall take into account any low- or moderate-income housing which has been provided or required pursuant to Section 65590.

(d) The review pursuant to subdivision (c) shall include, but need not be limited to, the following:

(1) The number of new housing units approved for construction within the coastal zone after January 1, 1982.

(2) The number of housing units for persons and families of low or moderate income, as defined in Section 50093 of the Health and Safety Code, required to be provided in new housing developments either within the coastal zone or within three miles of the coastal zone pursuant to Section 65590.

(3) The number of existing residential dwelling units occupied by persons and families of low or moderate income, as defined in Section 50093 of the Health and Safety Code, that have been authorized to be demolished or converted since January 1, 1982, in the coastal zone.

(4) The number of residential dwelling units for persons and families of low or moderate income, as defined in Section 50093 of the Health and Safety Code, that have been required for replacement or authorized to be converted or demolished as identified in paragraph (3). The location of the replacement units, either onsite, elsewhere within the locality's jurisdiction within the coastal zone, or within three miles of the coastal zone within the locality's jurisdiction, shall be designated in the review.

CALIFORNIA GOVERNMENT CODE SECTION 65751:

§ 65751. Writ of mandate

Any action to challenge a general plan or any element thereof on the grounds that such plan or element does not substantially comply with the requirements of Article 5 (commencing with Section 65300) shall be brought pursuant to Section 1085 of the Code of Civil Procedure.